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September 9, 2009

The Court will consider the Sur-Reply papers. Plaintiffs may submit a brief response (no more than 5 pages) by September 14, 2009. The motions will then be deemed fully submitted.

SO ORDERED
9/10/09
Theodore H. Katz
THEODORE H. KATZ
UNITED STATES MAGISTRATE JUDGE

BY HAND DELIVERY

The Honorable Theodore H. Katz
United States Magistrate Judge
United States District Court
Southern District of New York
500 Pearl Street
New York, New York 10007

Re: *Anwar v. Fairfield Greenwich Group*, Master File No. 09 CV 0118 (VM);
Ferber SEP IRA v. Fairfield Greenwich Group, 09 CV 2366 (VM);
Pierce v. Fairfield Greenwich Group, 09 CV 2588 (VM);
Morning Mist Holdings Limited v. Fairfield Greenwich Group, 09 CV 5012 (VM)

Dear Judge Katz:

Anwar et al v. Fairfield Greenwich Limited et al Doc. 236

We represent plaintiffs in the Derivative Actions, and write in opposition to Mr. Cunha's letter, dated September 8, 2009 ("Cunha Letter"), requesting "permission to file" a Sur-Reply in Further Opposition to Derivative Plaintiffs' Motions to Remand ("Sur-Reply") and Further Supplemental Declaration of Paul J. Sirkis ("Further Declaration";" collectively, "Sur-Reply Papers"). These papers, filed yesterday *without* the Court's permission, should be stricken.

The Sur-Reply Papers address no issues that could not have been raised in defendants' July 27, 2009 opposition brief. Defendants state that the Sur-Reply Papers are intended "principally" to address issues relating to their jurisdictional discovery, *see* Cunha Letter -- including the fact that, in their prior opposition papers, they relied on subpoena responses that "did not clearly indicate" whether various "beneficial holders" were "*current investors*." *See* Sur-Reply at 1 (emphasis in original). But those problems are of defendants' own making, and could easily have been avoided by defendants when they pursued the discovery.[1] Plaintiffs' reply brief, which pointed out obvious errors in defendants' July 27

[1] Indeed, in seeking leave to take the jurisdictional discovery, defendants represented that it was "necessary" to discover the "dates since May 1, 2006" that various persons had

footnote continued

opposition brief, does not entitle defendants to file a sur-reply. *See ADR/JB, Corp. v. MCY III, Inc.*, 299 F. Supp. 2d 110, 116 (E.D.N.Y. 2004) (denying motion to file sur-reply, which "raises no arguments or issues that could not have been considered by [movant] in its opposition papers.").

The Sur-Reply also unnecessarily delays resolution of the remand motions, which were filed months ago.[2] *See In re Livent, Inc. Noteholders Sec. Litig.*, 355 F. Supp. 2d 722, 734 n.11 (S.D.N.Y. 2005) (Marrero, J.) (denying request for leave to submit sur-reply papers, which would result in "unnecessary delays"). Indeed, due to the numerous factual and legal errors in the Sur-Reply, a sur-sur-reply would be required, further delaying the proceedings.[3]

We note, finally, that although purporting to request "permission" to file the Sur-Reply Papers, *see* Cunha Letter, defendants filed the papers *without* the Court's permission.[4] This tactic circumvents the process of requesting leave of Court, thus warranting the striking of the papers. *See Colida v. Nokia Am. Corp.*, 05 CV 9920, 2006 U.S. Dist. LEXIS 64578, at *10-11 (S.D.N.Y. Sept. 11, 2006); *Richard Feiner and Co. v. Turner Entm't Co.*, 96 CV 1472, 2004 U.S. Dist. LEXIS 21074, at *1 (S.D.N.Y. Oct. 21, 2004).

Respectfully,

Robert A. Wallner

cc: The Honorable Victor Marrero (by hand)
Counsel on attached Service List (by email)

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beneficial interests, *see* Letter of Mark Cunha to Judge Katz, dated Apr. 16, 2009, at 3-4; and the Court explicitly noted the proposed discovery requests in granting defendants' application to take the discovery and to adjourn the briefing schedule on the remand motions. *See Anwar v. Fairfield Greenwich Ltd.*, 2009 U.S. LEXIS 37077, at *9-10 (S.D.N.Y. May 1, 2009).

[2] The remand motions in *Ferber*, *Pierce* and *Morning Mist* were filed on April 8, April 14 and June 8, 2009, respectively.

[3] For example, as before, defendants rely on hearsay statements of non-parties to make their jurisdictional arguments. *See* Exhs. 1 and 2 to Further Declaration. Defendants also continue to count deceased individuals in quantifying the "current" beneficial holders. *See* Further Declaration ¶ 5; Plfs' Reply Mem., dated Aug. 21, 2009, at 7.

[4] *See, e.g.,* Dkt Nos. 232, 234 (09 CV 0118).